In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 3, Original.

THE STATE OF NEW MEXICO, COMPLAINANT,

vs.

THE STATE OF TEXAS.

Motion to Postpone Submission of the Case and to Reopen the Cause for the Introduction of Additional Testimony as to Accretion and Avulsion with Reference to a Limited Section of the River Flowing Around What Is Known as the Country Club Property Described in Paragraph VI of the Report of the Special Master Filed April 21, 1926, in Event Only that this Issue Should Be Deemed Material Under the Pleadings, and for Further Instruction to the Special Master to Make Findings and Recommendations to the Court Based Upon Such Additional Testimony as to Avulsion and Accretion as May Be Offered by the Parties.

To the Honorable the Supreme Court of the United States:

Comes now the State of Texas, by and through its Attorney General, Dan Moody, and after first having obtained permission of the court, files this its motion to postpone the submission of this cause, which has heretofore been set down for submission on January 3, 1927, and to reopen said cause for the introduction of additional evidence as to accretion and avulsion in that certain area hereinafter defined, only in event the court should decide this issue material under the pleading, and that the Special Master be instructed as heretofore to make special

findings as to avulsion and accretion in said area based upon such additional testimony, with his recommendations thereon as to the decree which would be appropriate to be entered.

The grounds upon which this motion is predicated are as follows:

I.

The State of New Mexico filed the bill of complaint in this cause and alleged therein that the true boundary line of the State of New Mexico and the State of Texas, in so far as the same is formed by the Rio Grande River, is "the middle of the channel of the Rio Grande River as it existed in the year 1850 and as shown upon plaintiff's pleading map marked Exhibit C" (Record, Vol. 1, p. 2), meaning and intending thereby that the Rio Grande River in the year 1850 followed the course shown on said pleading map.

The State of Texas answered by proper pleading and said that the boundary between the State of Texas and the State of New Mexico, in so far as same is formed by the Rio Grande River, was the Rio Grande River as it flowed on the 9th day of September, 1850, but denied that the plaintiff's pleading showed the true course of the Rio Grande River as it flowed on September 9, 1850. The State of Texas alleged that the Rio Grande River on September 9, 1850, was located as designated on defendant's pleading map, marked Exhibit A. (Record, Vol. 1, pp. 1-19.) And the State of Texas has at all times since, and now says, that the boundary between the State of Texas and the State of New Mexico, formerly the Territory of New Mexico, so far as that boundary is formed by the Rio Grande River, was on September 9, 1850, at the time of the filing of this suit, and at all times since said dates, and even now is the channel of said Rio Grande River as it flowed on September 9, 1850, all as pleaded by the defendant and proved by the evidence. Upon the hypothesis that the location of the Rio Grande River as it existed on the 9th day of September, 1850, was then and at all times had been the true boundary line between the two States, issue was drawn upon where said river was located on September 9, 1850, and the entire case

has been tried on that issue. The pleading in this case in this regard has never been changed and the State of New Mexico, through its pleading, at all times has asserted that the sole issue to be determined in this litigation is the location of the channel of the Rio Grande River as same existed on the 9th day of September, 1850, and that same has not been changed. The language used in New Mexico's bill of complaint is as follows:

> "Your orator further shows that by virtue of the propositions made by Congress in the said Act of September 9, 1850, and by the acceptance thereof by the State of Texas, as set out in said Exhibits 'A' and 'B,' the channel of the Rio del Norte, which is commonly called the Rio Grande, from the point where the thirty-second parallel of latitude intersected said channel in the year 1850, as the same existed at that time, became and was the western and southwestern boundary of said State of Texas from said parallel to the Gulf of Mexico, and that said boundary has remained unchanged to the present time." (Record, Vol. 1, pp. 2-5.)

Article 1 of the Constitution of New Mexico (Record, Vol. 1, p. 10) declares the boundary to lie "along said thirty-second parellel to the Rio Grande, also known as the Rio Bravo del Norte, as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees, forty-seven minutes north latitude." Upon the issues thus drawn by the pleading between the two States the testimony in this cause was taken and an effort made to locate the river as it flowed on the 9th day of September, 1850, because under the pleadings of the parties when the river was thus located the boundary line would be fixed. Neither party to the cause was concerned about accretion or avulsion as fixing the boundary, but attempted to locate, by all available testimony, the bed of the river as it ran on September 9, 1850. No testimony was entered in the record as to the formation of land by accretion, although much was said about avulsive changes, but this was in the effort to locate the course of the river as it flowed in 1850.

misspelling of Texas, to which I have heretofore called attention.

By reference to p. 3316 of the Record it will be seen that Survey No. 158 begins at the upper corner of Survey No. 155 on the bank of the river. I call attention to the fact that the plat of this survey shows also the adjoining surveys Nos. 155 and 156.

By reference to p. 3323 of the Record it will be seen that Survey No. 155 begins at the upper corner of Survey No. 154.

By reference to p. 3327 of the Record it will be seen that the next survey, which is No. 154, is so described in the field notes that it is difficult, if not impossible, thereby to attach it to the other surveys. But this defect will be found supplied by reference to p. 3330 of the record where the plat of Survey No. 174 appears as bounded on the west by No. 154, and the field notes make it begin at the lower corner of Survey No. 154, and the reproduction of the plat of Survey No. 91, which appears in the upper right-hand corner of the blue print filed herewith, shows No. 154 as west of the survey for S. A. Maverick No. 91, which I have already shown is a mistake for No. 174.

The foregoing statement shows that these surveys in this series are connected one with another and all bounded at the south ends by the Rio Grande, as is shown by the blue print filed herewith, and all of these surveys were made many years before the present controversy had arisen as to the location of the river of 1850, and cannot be in any connected with the alleged Salazar-Diaz survey, which practically constitutes all there is of defendant's case.

Complainants contention has been and still is that the so-called Salazar-Diaz survey, above El Paso, as presented in the record is not a genuine survey, but a fictitious and fabricated record, which must have been made many years after its alleged date, and in sup-

port of this contention much has been, and may still be, said as to the errors apparent on the face of the alleged record of the survey, which also covers a stretch of about 40 miles between San Ignacio and El Paso as to which no error has been discovered, so that when we find errors in the record above El Paso there is created at least a suspicion of the genuineness of that part the alleged Salazar-Diaz survey, which record sets out that the work from El Paso to Amoles, a distance of about 20 miles, was all done in nine days, while the 40 mile stretch below El Paso required four months. For 6 or 8 miles above El Paso the river runs through a rock-bound cañon, and the uncontradicted evidence shows that at one point on the west side of the river, which the Salazar-Diaz record was supposed to follow, the line falls so close to the hills on the east side of the valley, that there is not room for the river between the Diaz line and the foothills on the east, and that at another point the line ascends over the sides of the rocky hills 70 or 80 feet above the river, and that the line passes about 225 feet east of the International Boundary Monument on parallel 31° 47'; when as a matter of fact that monument is more than that distance west of the river; and the further fact that the series of surveys Nos. 154 to 162 as platted by defendant's experts to the Salazar-Diaz river, cannot be so platted without going beyond the limits of the valley and far upon the sand hills to the west thereof.

But I believe that it is unnecessary for the court to make any formal holding as to whether the Salazar-Diaz survey is fictitious and fabricated or not, because the evidence of the original Texas surveys as shown on the blue print herewith, beginning as early as 1854, shows such a different river that it cannot be reconciled with the Salazar-Diaz river and constitutes evidence of a superior and conclusive character as to the course of the river years before the present controversy arose.

If the court adopts my view, it should declare that the boundary of this part of the disputed portion is as shown by this series of surveys, beginning with No. 3, as that contains the Frontera Observatory, as to the location of which the experts on both sides in the present case have fully agreed, and in this connection reference should be made to the fact that the alleged Salazar-Diaz record locates the Frontera Observatory about 250 feet away from its correct location, and this is not disputed but agreed to by the experts on both sides, as will appear by reference to pp. 2809-10 of the Record. It is quite incredible that an accomplished engineer such as Diaz appears to have been, could possibly have made a mistake as to the location of Frontera in August, 1852, when it had been established by Major Emory in April of the same year. Stevenson Archer, district surveyor of El Paso District, in making Survey No. 3 in November, 1854, appears to have had no difficulty in fixing the astronomical point of Frontera by course and distance, as will be seen by reference to p. 3338 of the Record. Nor does John P. Randolph, deputy surveyor of El Paso County, appear to have had any difficulty in fixing that astronomical point as late as March 2, 1888, as will appear by his field notes of Survey No. 91 at p. 3334 of the Record. Nor did John H. Clark appear to have had any difficulty in locating Frontera in 1859, and his field sketch which appears at p. 3120, as plaintiff's Exhibit No. 26, shows Frontera and the course of the river for more than a mile above and might serve as assistance to any commissioner appointed by the court in ascertaining the course of the river above Frontera.

I submit to the court that the alleged Salazar-Diaz record cannot be relied upon to any extent as showing the course of the river, which is the boundary, and should be discarded from all consideration by the court, or by any commissioner appointed by the court to delineate the boundary on the ground.

The object of the court is, of course, only to establish the location of the river of 1850 as the boundary, and the series of Texas surveys as hereinbefore set out, and as they appear on the blue print filed herewith, are quite conclusive evidence as to where the river flowed before the alleged discovery of the Salazar-Diaz record, which as I now recollect, appears first to have come to light about 1908.

I cannot tell how far above Frontera the line of the river can be followed according to the Texas surveys, but it must be nearly one-half of all of the disputed area. There is no evidence in the record to show that the river above the end of these surveys ever occupied any position near the west side of the valley as claimed by Texas, except the discredited Salazar-Diaz record, and the extraordinary conclusion reached by the Scott-Cockrell Commission, which I will not undertake to discuss any further at this time, as I believe sufficient has been presented in connection with the petition for rehearing to show that it is entirely unworthy of belief, as that commission does not appear ever to have made the slightest attempt to reestablish any of the Clark lines, which was the purpose of its creation, except as to the location of Monument No. 1, which I believe I have heretofore shown was without any sufficient foundation.

In conclusion, it must be said that there can be no valid objection on the part of defendant to the adoption for the location of the river, of a line indicated by its own surveys which defendant has sponsored by putting them in evidence, which is not far from that indicated by the map of Post, based upon information from old men. That line naturally does not follow each crook or bend as shown by the southern ends of the Texas surveys. I am urging the adoption by the court of a river, as the boundary, shown by defendant's own evidence as far up the river as Survey, No. 262, beyond which we have no direct connection. How far up the river

that will take us, I cannot say, but it seems certain that it m
as far as the preposterous survey of the Canutillo Grant and pro
into that survey. From there on, it is impossible without evid
of which there is none, to carry the river across the valley to
west so as to connect with the river claimed by Texas in the nor
part of the disputed area, or with the river established by the S
Cockrell mission at the 32nd parallel.

We are then left, beyond Survey No. 262, without any s
factory evidence as to the course of the river except what is s
by Post's map based on information from old men, and as
map so based is shown to be approximately correct by defend
own evidence between Frontera and the upper end of No. 26
is only reasonable to believe that it is correct beyond No. 26

And if the Court will hold that Clark's Monument No. 1
at his station No. 1, there will be little or no difficulty in def
ing the course of the river from No. 262 to a point 600 feet
of that Monument No. 1, Clark having said that the river wa
feet from his Monument No. 1.

In any event, whether the court holds that the so-called So
Diaz record of a survey so far as the part above El Paso is
cerned, was or was not fabricated long after its date in 18
I am convinced it must have been, yet it is shown to be so erro
and defective as to afford no guidance as to the location o
river at that time at any place, especially as it is shown b
doubt by defendant's own evidence to be entirely wrong for a
of miles. The maxim as to false in part is applicable and de
all belief in it as a whole.

All of which is respectfully submitted.

FRANK W. CLANCY,
Special Counsel for New M

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JAN 16 [illegible]
CHARLES ELMORE [illegible]
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IN THE

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OCTOBER TERM, 1927.

Number 2, Original.

THE STATE OF NEW MEXICO, *Complainant,*

versus

THE STATE OF TEXAS, *Respondent.*

Supplemental Brief in Support of Complainant's Petition for Rehearing, Dealing Solely with the Proposition that the Opinion and Decision of the Court in Regard to the Applicability of the General Rules of Accretion and Avulsion to the River Boundary Should Be Withdrawn and Reconsidered Because of Certain Errors of Fact.

J. HARRY COVINGTON,
On Behalf of New Mexico.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE DECISION AND OPINION OF THIS COURT.

On December 5, 1927, this Court rendered its decision and gave its opinion in this cause. This Court decided.

1. That the location of the Rio Grande as it flowed in 1850 from the parallel of 32 degrees north latitude to the International Boundary between the United States and Mexico was as found by the Special Master and substantially as contended for by the State of Texas.
2. That the Special Master erred in applying the recognized rules of accretion to the Rio Grande, so located, in determining the boundary line because the Court believed that the United States and Texas, before New Mexico became a State, had recognized as the boundary the river of 1850 without regard to changes by accretion.

The first portion of the decision has been discussed in the brief attached to the petition. This brief is restricted to a discussion of the second portion of the opinion and decision of this Court.

The complainant submits that the finding of fact of this Court—appearing on page 17 of the opinion and more fully discussed below—, that from 1850 to 1912 the United States and Texas recognized the line of the river of 1850 "*without reference to subsequent changes by accretions*" as the boundary, was an error into which this Court was inadvertently led by the brief of Texas; that it was directly at variance with findings of fact by the Special Master; that evidence introduced by the State of Texas shows conclusively that changes by accretions from the 1850 line of the river, as now determined, were recognized; and that by reversing the Special Master on this point this Court will create hardships to great numbers of citizens of both states, parties hereto, not contemplated by this Court and provocative of endless litigation.

As Late as 1923 Texas Conceded—Insisted—that Rules of Accretion Applied.

The present litigation began in January, 1913. In December, 1923, eleven years later, Texas filed its principal brief in this case. On pages 11 and 12 of Part I of that brief Texas stated its contentions, in part as follows:

> "*Second:* That the true river boundary line became and is along the middle channel of the Rio Grande River (following the deepest channel when there is more than one) as it existed in the year 1850, *subject, of course, to such changes as have occurred since that time through natural and gradual process.*" (p. 11.)
>
> * * * * * * * * *
>
> "The foregoing presents the issues stated in the pleadings. The pleadings state and the parties concede that the true boundary, whether fixed by the treaty of Guadalupe-Hidalgo or the act of Congress, September 9, 1850, is along the middle of the channel of the Rio Grande River. The location of the present true boundary consequently is the middle of the channel of said river as it existed at the time when the provisions of said congressional act or the stipulation of said treaty became effective or were performed and consummated, *subject to such changes as have occurred since that time through gradual and natural processes.*" (p. 12)

In support of this contention that the doctrine of accretion is applicable to the present river boundary, the brief on behalf of Texas appends the following note to the last sentence quoted above:

> "The rule is stated in Arkansas vs. Tennessee, 246 U. S. 758. See opinion of the Attorney of the

United States as referred to and quoted in the case of Neb. vs. Iowa, 143 U. S., 360, relating to the boundary under the treaty of Guadalupe-Hidalgo, holding that said treaty did not provide for a fixed boundary. See also the majority opinion and arbitral award in the Chamizal Arbitration found in the minutes of the meeting of the International Boundary Commission from June 10 to 15, 1911, holding that the Guadalupe-Hidalgo treaty of 1848 fixing the fluvial boundary between the Republic of Mexico and the United States is not a treaty designating a fixed unchangeable line (agri limitati), but did create an arcifinious line (agri arcifinii) and therefore the boundary is subject to modifications by accretion and erosion."

Importance of Finding of Fact that Parties Recognized River Line Without Regard to Accretive Changes.

Before turning to the facts as found by the Special Master and as shown by the record, we should briefly indicate the importance of the above finding of fact in determining the conclusion of law reached by this Court.

The reasoning of the Court will be found on pages 16 and 17 of the opinion, and is as follows:

Conclusion of Law:

"This case is not one calling for the application of the general rule established in (citing case) as to changes in State boundary lines caused by the gradual accretions on a river boundary." (p. 16)

Reasoning:

Major Premise:

"It is well settled that governments, as well as private persons, are bound by the practical line that has been recognized and adopted as their boundary. (citing cases" (p. 17)

Minor Premises:

(a) The channel of the Rio Grande was adopted in 1850 as the boundary line by legislative enactments. (p. 16, last paragraph)

(b) "From that time to the admission of New Mexico as a State in 1912, it appears that both Texas and the United States, which had paramount jurisdiction of the boundaries of the Territory, recognized and acquiesced in the line of the river as it was located in 1850 when the Territory was created, as the boundary between the Territory and Texas, without reference to subsequent changes by accretions; Texas, on the one hand, exercising jurisdiction over the area in dispute by making surveys and granting patents to the line of the river in 1850, and the United States, on the other hand, neither issuing any patents to land east of the river as located in 1850, nor challenging in any manner the claims of Texas or its patentees. Furthermore, New Mexico, when admitted as a State, itself recognized the boundary line that had thus been acquiesced in and tacitly recognized for more than half a century, by explicitly declaring in its Constitution that its boundary ran 'along said thirty-second parallel to the Rio Grande * * * as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, *following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty,* to the parallel of thirty-one degrees, forty-seven minutes north latitude.' And this was confirmed by the United States by admitting New Mexico as a State with the boundary thus described."

The conclusion of the Court therefore rests solely upon the supposed fact that the United States and Texas for sixty-two years recognized the line of the river of 1850 *without regard to accretions*, coupled with certain language in the Constitution of New Mexico. If the supposed fact of recognition were not in truth a fact, but the contrary were true, then obviously as we shall show below, the language in the Constitution must be read in a very different light—that is, it would assume that the 1850 line would be varied by accretions in accordance with the general rule. In any event a situation would be created, so at variance with that believed to exist by this Court, that a correct and just settlement of the controversy would require, we respectfully submit, a withdrawal of the opinion and a reconsideration of the matter in the light of the true facts.

The Facts As Found By the Special Master.

Section IV of the report of the Special Master, filed April 21, 1926, is entitled "The Defendant's Evidence." It extends from page 45 to page 75, of the printed volume containing it. The first subsection, extending from page 46 to page 54 is entitled "(1) The Texas Land Surveys and Patents."

From the 32nd Parallel to the Canutillo Grant, Texas Has Recognized All Accretive Changes.

On page 48 appears the following finding of the Special Master:

> "(1) The patents for lands lying between the 32nd parallel and the north line of the Canutillo Grant, and extending south from that parallel a

little over six miles. Most of these patents were issued between 1860 and 1873, and were based on Surveys made in the years from 1849 to 1873 (with the exception of the Marsh Survey made in 1881, and the Groesbeck survey)—the Surveys being numbered 161, 162, 54, 281, 35, 34, 163 to 172 inclusive. The Maverick Surveys 161 and 162 (made by Anson Mills) were immediately south of the 32nd parallel and were bounded on the west by the Rio Grande *as it flowed in 1860*. South of these were Surveys 35 and 34, with their western boundary on the Rio Grande *as it flowed in 1849*. South of Surveys 35 and 34, there were the Maverick Surveys 163, 164, 165, 166, 167, 168, 169, 170, 171, 172 (made by Anson Mills), extending southerly in the order named (except 172, which was to the west of the others and bordering on the Rio Grande *as it flowed in 1860*). I find that within this latter group of Maverick Surveys, in 1858, their owner intended to include all the vacant land between Survey 34 and the Canutillo Grant, and to have a *frontage on the Rio Grande.*"

The above finding should be read with the assistance of Defendant's Exhibit No. 62, Record Volume VI, red number 5727, following printed page 3380, reproduced in this brief.

Upon this map the line of the Salazar-Diaz survey of the Rio Grande, which is the 1850 river line fixed by this Court as the boundary, is shown as a heavy black line, while the line of the Texas surveys and patents referred to above is shown as a light black line.

The northern section of this map shows with the utmost clarity that, in the area referred to above, Texas has not surveyed or patented a single tract of land bounded by the river line of 1850 unchanged by accretions. On the contrary, every survey was based upon the location of the river when the survey was made.

Furthermore, the Special Master finds as a fact—see page 82 of his report—that the line of the Texas surveys in this area take into account *every accretive change which has occurred in the 1850 river line.*

Therefore in this area the exact contrary of the Court's finding is true. The United States and Texas have never recognized here the 1850 river line without regard to changes by accretions as the boundary. But the line found by the Master to have been recognized as the boundary gives full recognition to every accretive change in the 1850 river line.

The result of the decision of this Court is to produce the exact opposite of the result intended by the Court —*i. e.,* to impair every patent issued by the United States and Texas along the line which the Master found had been recognized as the boundary by both.

To be specific:

Texas survey 35 is the first to be effected by the Salazar-Diaz line now made the boundary. This survey is bounded on the west by the river as it flowed when the survey was made. The master finds that this accords with the 1850 river line as changed by accretions. By taking the line of the river of 1850 without regard to accretions a large area, adjoining the upper half of Survey 35, is taken away from New Mexico and added, as public land to Texas—*although Texas never surveyed, patented or exercised jurisdiction over this added area.* Similarly the southwestern corner of survey No. 35 is taken away from the Texas patentee and becomes public land in New Mexico.

The Texas Patentee of Survey 34 will lose under this Court's decision approximately one half of the east and west area of this survey. The land will become public land in New Mexico.

The western boundary of Texas Survey 172 which the Master has found, and which appears on the map, "bordering on the Rio Grande as it flowed in 1860," and which accords with all accretive changes in the 1850 river line, crosses the 1850 line of the river, unchanged by accretions, *seven times*. Under the decision of this Court the titles of owners of this tract, so far as they derive from the Texas patent, *will be voided as to five separate tracts. And three separate tracts which have never been patented or claimed by Texas and over which it has never exercised jurisdiction* will be taken from New Mexico and added to Texas.

The Special Master recommends that the boundary between Texas and New Mexico in this area be determined as the western boundary of these Texas surveys and patents (page 91, section (b)).

The Patent for the Canutillo Grant Recognized All Accretive Changes.

In this area the error in regard to the 1850 river line unchanged by accretions is particularly apparent, and its consequences will result in far reaching hardship and litigation.

In regard to this patent the Special Master found as follows (p. 49):

> "This land was a Mexican grant made in 1823; it was surveyed by Anson Mills in 1860, being Survey No. 173.(1) It was resurveyed by John P. Randolph and a patent was issued by the State of Texas, in 1886. The boundaries (except possibly the river boundary) contained in this patent can be substantially identified on the ground. It is certain that by far the greater part of the land

patented was, in fact, located west of the location of the river claimed by New Mexico. Much evidence was introduced by the plaintiff to sustain its contention that the Surveys, both by Mills and by Randolph, were incorrect and not in accord with the boundaries set forth in the original Mexican grant. I find this evidence to be irrelevant, inasmuch as the Surveys, whether they were or were not incorrect, did, in fact, lay claim to land in the valley bounded on the west by the Rio Grande as shown on the maps made by Mills and Randolph introduced in evidence by the plaintiff. It is possible that these Surveys laid claim not only to all the land east of the river as contended for by the State of Texas but also to land lying west of the Rio Grande; and the plaintiff has introduced evidence to that effect. (1) But even if this were true, it would not alter the fact that the Surveys did lay claim to the land *as far west as the Rio Grande as it ran at the dates of the Surveys'.'*

Thus by two surveys, one in 1860 and the other in 1886, the western boundary of this tract, and the western limit of land patented by Texas, was not the line of the river in 1850 but the line of the river as it flowed when the surveys were made—that is, taking into consideration changes by accretion.

A glance at the map above referred to will show the drastic difference between the 1850 line of the river and the line always recognized by Texas.

The very northwestern corner of this tract is to the west of the 1850 line. The Texas survey thus crosses the 1850 line in an easterly direction and then sweeping west again recrosses the line. The area between these two points of intersection—never claimed by Texas—will under this present decision be taken from

this present owner and be made public lands in Texas.

After crossing the 1850 line in a westward direction the line of the Texas surveys remains entirely to the west of the 1850 line until almost to the southwest corner of the Canutillo Grant. There is thus a large area between the western boundary of the Texas survey and the more easterly line, which this Court determines has always been recognized by Texas and the United States as the boundary line. This area comprises more than 400 acres.* Its present value is in excess of $100,000.

By the decision of this Court all titles in this area are void since the land never was in Texas. This decision is largely rested upon a finding of fact which these owners will hardly understand—that is that Texas always recognized a line far to the east of them as the boundary line and based its patents thereon.

The Special Master, on the other hand, by his decision did not disturb any of these titles. The Special Master found that the State of Texas in the area of Survey 173, the Canutillo Grant, had surveyed and patented to the line of the river as it flowed in 1860 (pages 49-50); that the changes from the 1850 river line to the line of the Texas patents were exactly the accretive changes in the river after 1850 (page 82); and that the boundary between the parties in this area was that shown on Texas Survey 173, being in general to the west but in some instances to the east of the 1850 river line.

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*A better conception of the size of this portion of the Canutillo Grant can be obtained from Plaintiff's Exhibit 280, Record, Additional Testimony, facing p. 66. The tract appears to the northwest of the title of the map.

Patents South of the Canutillo Grant Recognized Most Accretive Changes.

These patents are referred to by the Special Master on page 50, *et seq.*, of his report. Here the maps are not of great assistance because, as the Special Master found, there is much overlapping and confusion in the field notes of the surveys. (Report, p. 50.) Different engineers who testified for Texas located the surveys in different positions. (See Def. Ex. 62, 65, 67; Brief for Amicus Curiae, filed Nov. 7, 1924, pp. 10 *et seq.*)

One fact, however, is certain: When these surveys were made in 1849, 1860 and 1873 the surveys and patents claimed as a boundary the river as Texas contended that it flowed *when the surveys were made*—that is, recognizing changes in its course. No attempt was made, or ever has been made to base these Texas patents on the course of the river in 1850.

The Special Master found (page 50):

> "I find, however, that, whatever may be the exact location of the Surveys today, the intentions of the surveyor and of the applicant for land and of the patentee in seeking patent were to claim (at least in part) west of the location of the river for which New Mexico now contends, and to claim (so far as Surveys and patents set up a boundary on the Rio Grande River) *land lying at least as far west as that river then flowed.*"

(Page 51)

> "I regard this evidence (plaintiff's evidence as to location of surveys) as of little value; *since the Surveys themselves claimed the river bank for their boundary.*"

The Special Master then finds that while the course of the river when these surveys were made was in general similar to its course, as found by him, in 1850, there are many variations. And the Texas patents are based upon the river, recognizing the changes by accretion which had occurred from time to time preceding the respective surveys. Counsel for Texas admitted this in 1923, saying (Brief, pp. 268-269):

> "Consequently and frequently, changed locations of the river by natural or other cause along the prior surveys have influenced the location of the subsequent surveys."

A striking illustration of the recognition of accretive changes by Texas appears in Part I of its brief filed Dec. 8, 1923, pages 286 and 287. On page 286 counsel for Texas quote their witness Campbell in regard to one such survey:

> "In view of the statement of Mr. Tays (the 1871 surveyor) that the river at this point was yearly changing the lengths of these surveys, my conclusion is that between the time of the location of survey No. 157 and the location of survey No. 259, the river shortened the west line of survey No. 157, and that when survey No. 259 was made, it was commenced, not at the original corner of the survey No. 157, but at a point north of that corner on the west line of survey No. 157, this point being indicated on defendant's Exhibit No. 70, by the intersection of the line drawn across the south end of survey No. 259, with the west line of survey No. 157."

The map on page 287 of the Texas brief shows the accretive changes in survey 157 which were recognized

by Texas surveyors in making a resurvey ten years later.

Proceeding to the extreme southern portion of the area south of the Canutillo grant the Special Master found that in 1905 the United States in surveying and patenting lands in this area took as the northeastern boundary of New Mexico the river of 1905. In the area where these surveys were made this boundary was considerably south of the 1850 river line and hence to the advantage of Texas. (See Def. Ex. 65, Rec. Vol. VI, Number 5729.) But it clearly shows that the United States recognized, *pro tanto*, the river, as changed by accretion, as the boundary.

The accretive changes in the river since 1850 in this area south of the Canutillo grant and above the Canyon have been found by the Special Master to consist of an eastward and then westward bend in the northern or Country Club area—which favors New Mexico —, and a movement southward in the lower part of the area—which favors Texas. (Report, pp. 84-90, incl.) As stated above the area thus enclosed by the river in the lower section has been recognized by the United States and New Mexico for more than twenty years as being within the State of Texas. The decision of this Court places it—and more—within the State of New Mexico. (See Defendant's Exhibit 65, *supra*.) The northern area has been in dispute for many years prior to this litigation, certain of the claimants basing their titles on patents issued by the United States prior to the admission of New Mexico as a State.

The Master Did Not Find that Texas and the United States Had Recognized the 1850 Line Without Regard to Accretive Changes but Quite to the Contrary.

On page 54 of the Master's report appears the following paragraph:

> "On the above evidence * * * I find that for at least thirty years while New Mexico was a Territory and prior to its admission as a State, the United States made no challenge of the claims to lands asserted by the State of Texas and by its citizens through surveys, patents and locations, and that it, impliedly, at least, recognized the practical line that had been established as the boundary between the Territory and the State, so far as this line lay in the Rio Grande."

As we have pointed out above the Special Master found that "the practical line that had been established as the boundary" line and recognized for thirty years was for more than the first two-thirds of its distance from the 32nd parallel to the international line —*i. e.*, for about the first eleven miles of the approximate fifteen—*exactly coincident with the 1850 river line as altered by the accretive changes which had taken place since that time.*

He also finds that from the southwest corner of the Country Club property to the international line "the practical line that had been established as the boundary" *was also coincident with the 1850 river line as altered by accretive changes which had occurred since that time.* This represents approximately three of the remaining five miles of the boundary line.

In practically no place at all is "the practical line

that had been established as the boundary" coincident with the 1850 River line without regard to accretive changes.

For less than one mile the so-called practical line does not accord with the 1850 river line as altered by the final accretive changes, instead cutting across the bend formed by the accretive change of the river. But neither, for this distance, does the practical line conform to the 1850 river line without recognizing accretive changes. It is, rather, the 1850 river line as altered by accretive changes, in some parts, as of 1860 and, in other parts, as of 1871. It is here a half developed and unsettled line. Being neither the Rio Grande of 1850 nor that river with all its accretive changes, it has no legal significance; and being unsettled and disputed when New Mexico became a state it has no preemptive force. It is the one point in the whole boundary where Texas resists giving full effect to the accretive changes in the 1850 river line.

We, therefore, respectfully submit that this Court was in error when it stated that the United States and Texas had from 1850 "recognized and acquiesced in the line of the river as it was in 1850 when the territory was created, as the boundary between the Territory and Texas, without reference to subsequent changes by accretions."

We submit that the findings of the Special Master show that the entire boundary as claimed by the Texas surveys and patents—except for one space of less than a mile—*recognize all accretive changes in the 1850 river line as found by the Special Master;* that in the short distance which furnishes the exception, the doctrine of accretion was applied by Texas for twenty years after 1850 and that in this area there are con-

flicting claims between citizens of the two states arising under Texas and United States patents.

And we also submit that to apply the decision of this Court fixing the 1850 river line without regard to accretions—which is not the established line as found by the Special Master—will cause interminable litigation and great hardship.

The Constitution of New Mexico Did not Change the Boundary.

On page 17 of the opinion of this Court, after making the finding discussed above,—that both Texas and the United States have recognized as the boundary the line of the river as it was located in 1850 without reference to subsequent changes by accretions,—this Court went on to discuss the effect of certain provisions appearing in the Constitution of New Mexico. The Court said:

> "New Mexico, when admitted as a State, itself recognized the boundary line that had thus been acquiesced in and tacitly recognized for more than half a century, by explicitly declaring in its Constitution that its boundary ran 'along said thirty-second parallel to the Rio Grande * * * as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, *following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty,* to the parallel of thirty-one degrees, forty-seven minutes north latitude.' And this was confirmed by the United States by admitting New Mexico as a State with the boundary thus described."

This Court, believing that the United States and Texas had recognized the river line of 1850 without

reference to accretive changes as the boundary, interpreted the Constitution of New Mexico as also recognizing the 1850 line without accretive changes. If, however, this Court had understood that line found by the Master to have been recognized by the United States and Texas, was along practically the entire boundary, not the 1850 line unchanged by accretions, but the 1850 line *giving full effect to all changes by accretions*, then clearly this Court would not have construed the Constitution of New Mexico as referring to a boundary which had not been recognized by the United States and Texas.

The Constitution adopted by the State of New Mexico could not change the boundary of Texas adversely to Texas. Neither could it extend the boundary of Texas without the consent of that state. We have shown above that the line recognized by the United States and Texas crosses and recrosses the 1850 river line throughout the entire distance from the thirty-second parallel to the international line. Considerable and valuable areas over which Texas has exerted jurisdiction and which it has surveyed and patented lie to the west of the 1850 river line, and similar large sections which have been surveyed and patented by the United States as belonging to the Territory of New Mexico lie to the east of the 1850 river line. The Constitution of New Mexico could not take from Texas these areas lying to the west of the 1850 river line, nor could it give to Texas without the consent of that State the areas lying to the east. Clearly, it was the intention of the United States in admitting New Mexico as a State to give it the boundaries of the Territory of New Mexico.

The Constitution of New Mexico declared the boundary to be:

"along said thirty-second parallel to the Rio Grande * * * as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees, forty-seven minutes north latitude."

After this litigation had been in progress for ten years the attorney general of Texas declared. (Brief filed Dec. 8, 1923, Part I, p. 11):

"that the true river boundary line became and is along the middle of the channel of the Rio Grande River (following the deepest channel when there is more than one) as it existed in the year 1850, subject, of course, to such changes as have occurred since that time through natural and gradual process."

If Texas has assumed from 1850 to 1924 as we have shown above, that in establishing the river line of 1850 as the boundary line this was "subject, of course, to such changes as have occurred since that time through natural and gradual process," it is, of course, apparent that in drafting the Constitution of New Mexico, the Constitutional Convention assumed the same proposition of law.

We shall not unduly prolong this supplementary brief by further discussion of the Constitution of New Mexico. It is, we respectfully submit, clear that the whole question of importance at the present time is the correctness of the finding of fact made by this Court that the United States and Texas from 1850-1912 recognized the line of 1850 without regard to sub-

sequent changes by accretions. That finding is the basis of the Court's decision on the subject of accretion. If the Court has misunderstood the Master's findings and has inadvertently fallen into error of fact, then obviously the entire situation is so different from that believed to exist by the Court that the opinion should be withdrawn and the Court should reconsider its decision upon this question. And since the question is so highly technical and involved, we respectfully submit that the Court should have the assistance of argument by counsel from New Mexico and Texas upon this important matter.

The Pleadings.

We shall refer only briefly to the pleadings since the Court on page 16 of its opinion, although stating that there were no issues under the pleadings as to accretions or changes in the boundary line since 1850, nevertheless stated that it was deciding the case without reference to this fact. If it is said that there were no issues under the pleadings as to accretions, it may well be answered that there were no issues because both parties agreed that the doctrine of accretion and avulsion applied to the location of the boundary line. The parties differed only as to where the river of 1850 should be located. Once this was located, the parties were as one in stating that if it subsequently changed by accretion the boundary also changed. We have already pointed out the statements to this effect by counsel for Texas.

On page 79 of his report the Special Master said:

> "I consider that the allegation in the pleadings that the channel of the river as it existed in 1850

'now is the boundary' is to be interpreted as meaning the channel of the river as it existed in 1850 subject to the well settled principles as to accretion and avulsion which this Court has laid down in State boundary cases." (See also Missouri vs. Neb., 196 United States, 23, 36, 37). Such must certainly have been the interpretation placed upon the pleadings by this Court; for by its order of April 14, 1924, it expressly permitted the plaintiff to take additional testimony on the subject of accretion with reference to a limited section of the river. * * *"

Furthermore, this Court, in disregarding in a case between two States of the Union the strict rules of pleading as applied to suits between individuals, was but giving added authority to the rule which it had already laid down for such cases. In Virginia vs. West Virginia, 234 U. S., 117-121, the Court said:

"there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the decision of the case."

In any view, therefore, of the present case, the question of the application to the river boundary of the recognized rules of changes by accretion is properly before the Court.

CONCLUSION.

We earnestly and respectfully submit to the Court that (aside from the question of the determination

where the Rio Grande River was located in 1850 discussed in the main brief supporting the petition) its decision that changes by accretions in the 1850 river line do not affect the boundary between New Mexico and Texas was founded upon the erroneous conclusion of fact that Texas and the United States, before New Mexico became a State, had recognized as the boundary the 1850 river line without regard to subsequent changes by accretions, and that for this reason, if for no other, the petition for rehearing should be granted.

Respectfully submitted,

J. HARRY COVINGTON,
On Behalf of New Mexico.

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